U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 26 July 2006

CASE NO.: 2005-LHC-707

OWCP NO.: 07-163096

IN THE MATTER OF:

SCOTT DUCKWORTH

Claimant

v.

CSX CORPORATION

Employer

and

SEA BRIGHT INSURANCE COMPANY

Carrier

APPEARANCES:

CHRISTOPHER SCHWARTZ, ESQ.

For The Claimant

ROBERT R. JOHNSTON, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, (herein the Act), brought by Scott Duckworth (Claimant) against CSX Corporation (Employer) and Sea Bright Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 13, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered thirteen exhibits, Employer/Carrier proffered twenty-nine exhibits, twenty-eight of which were admitted into evidence. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations[2] of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated and I find:

1. The date of alleged injury was March 4, 2002. (Tr. 17).

2. Claimant's alleged injury occurred during the course and scope of his employment with Employer. (Tr. 18).

3. An employee-employer relationship existed at the time of the accident/injury. (Tr. 17).

4. Employer was timely notified of the injury. (Tr. 22).

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-__.

[2] The parties did not submit a Joint Exhibit of stipulations; however, at the beginning of the hearing factual stipulations were agreed to.

5. Employer/Carrier filed Notices of Controversion on March 8, 2002, April 15, 2002 and June 7, 2002. (CX-4).

6. An informal conference before the District Director was held on December 9, 2004. (Tr. 35).

7. Claimant has received some, unspecified amount of compensation. (Tr. 19).

8. Medical benefits have been paid pursuant to Section 7 of the Act, with the exception of Dr. Pribil's bills which allegedly were paid under Claimant's private health insurance through the Seafarer's International Union. (Tr. 19-20).

9. Claimant's average weekly wage is $1,277.37. (Tr. 20). The compensation rate of $851.58 was initially paid, and was reduced by Employer to $666.78 based on Employer's labor market survey. (Tr. 21).

10. MMI has not yet been reached. (Tr. 24-25).

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether or not an accident occurred. (Tr. 26).

2. Nature and extent of disability. (Tr. 25).

3. Rate of compensation. (Tr. 25).

4. Necessity of medical treatment, specifically, the surgery performed by Dr. Pribil. (Tr. 25).

5. In the event permanency is reached, Section 8(f) special fund relief is at issue. (Tr. 26-27).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant, 42 years old, testified at the formal hearing and in deposition. Following high school graduation in 1983,

Claimant worked for his father's tire business for several years then joined the military. After his military service, he owned a shrimp boat for a couple of years and then owned a tire service company. Once he started working in the maritime industry, Claimant took classes through his union and received several different ship ratings. He also took a Marine Electrical Maintenance class which qualified him to work aboard U.S. flagged ships. (Tr. 36, 37, 38).

Claimant had a prior work-related accident in 1999, before he began working for Employer. He slipped on some hydraulic oil and twisted his knee and bruised his back. As a result, Claimant had right knee surgery for a torn meniscus and suffered from back problems. He underwent work conditioning and physical therapy and stated that within about three months he was "a little bit over the hundred percent" and was able to go back to work. This accident led to Claimant filing suit against Waterman Steamship, who eventually settled with Claimant through mediation. Dr. Gallagher was Claimant's physician for these injuries. (Tr. 38, 39).

Claimant was hired through his union to work for Employer around October or November 2000. Claimant acknowledged that he had to take a physical and drug test every year for his Union and in order to be hired by Employer. During Claimant's 2000 physical, he told the presiding doctor, Dr. Wei, that he had some slight disc herniation in his back. Prior to his accident with Employer, Claimant had discussed his back problems with Dr. Gallagher who told Claimant he could go back to work. Claimant attempted to go back to work on ships, but the movement of the ships bothered his knee. Dr. Gallagher suggested Claimant find a job onshore. When Claimant was offered employment with Employer, he discussed the job with Dr. Gallagher and told him everything the job required. According to Claimant, Dr. Gallagher told him that as long as he could do the job, then Dr. Gallagher had no problem with it. Nor did Dr. Gallagher restrict any of Claimant's activities due to Claimant's back problems. (Tr. 38, 39, 40, 41, 48).

While working for Employer, Claimant lost time from work when he was bitten by a brown recluse spider, had problems with carpel tunnel syndrome and was absent due to other illnesses such as the flu. Claimant was never reprimanded for missing time at work. Ed Washburn was the head engineer for Employer and was Claimant's supervisor. David Merida was Claimant's watch partner; they worked together for about a year and a half. Claimant stated that he and Mr. Merida did not get along well

and that Mr. Merida physically threatened Claimant on several occasions.[3] Claimant believed Mr. Merida did not like him because Claimant had sued his previous employer regarding his knee injury. Claimant acknowledged going to have drinks with Mr. Merida on two occasions after work. (Tr. 41, 42, 43, 44, 59).

Claimant knew that Mr. Merida kept a diary because he would see Mr. Merida writing in it. Claimant complained to the port agent of the Seafarer's International Union regarding the personality conflict between himself and Mr. Merida. He was told to make the complaint to his supervisor, Ed Washburn; however, Claimant never referred his complaint to Mr. Washburn. Claimant never asked to have another watch partner assigned to him, nor did he seek another job because of the personality conflict. Claimant stated that he never told anyone that he was going to stage an accident or hurt himself. He did make comments to Mr. Merida complaining that the job was unsafe and that somebody could get hurt. Claimant explained that Mr. Merida was in good shape, better shape than Claimant, and that Mr. Merida wanted to "manhandle everything." Claimant was never told he was lazy or not a good worker. (Tr. 44, 45, 46, 60).

On March 4, 2002, Claimant, Al Ragas and Herman Bergeron were upstairs in a storage room dusting and cleaning. Claimant bent down to move a 50-75 pound transformer that was stuck up underneath a shelf on the ground so that he could sweep behind it. When he lifted up on the transformer, he felt a sharp pain in his back and his hip started to give him problems. Claimant stated he was not having back pains prior to this incident, nor was he having any sort of back pain on the day of the accident. Claimant stated he was not working near Mr. Merida at the time of the accident because Mr. Merida was outside doing welding work. Immediately after the accident, Claimant sat down on a bucket and told Mr. Ragas what had happened. Subsequently, Claimant completed an accident report with Ed Washburn and then went to see Dr. Gallagher. (Tr. 46, 47, 48, 51).

Claimant explained that Al Ragas and Herman Bergeron were about seven feet from him when the accident occurred. The two

[3] On cross-examination, Claimant asserted that Al Ragas and probably Herman Bergeron were eyewitnesses to the threats made by David Merida. Claimant acknowledged that both men denied having heard any such threats and as an explanation Claimant stated, "They all stick together over there." (Tr. 108). Claimant was asked why David Merida threatened him. Claimant explained that Mr. Merida was mad because Claimant wanted to take an extra week of vacation time, which meant that a union hall worker would come in and temporarily replace Claimant. (Tr. 123, 124).

men were cleaning up one wall in the storage area and Claimant was cleaning the other wall. They had their backs to Claimant while they were working. The storage area was a noisy area due to the presence of air compressors and large fans; Claimant, however was able to communicate with the two men. Claimant explained that he lifted the transformer about six inches off the ground to move it a couple of feet. He stated the transformer would have made a loud noise when it hit the deck and he would have expected Mr. Ragas or Mr. Bergeron to hear it.

Claimant has not applied for any type of job or any vocational training since his March 4, 2002 accident. He stated he is incapable of working due to his back pain. (Tr. 104-106).

Prior to the March 4, 2002 accident, Claimant alleged that he injured himself in a work-related accident in October 2001. Claimant and David Merida were carrying a large, 300-pound piece of steel when Claimant tripped on a ledge.[4] Claimant did not notice any problems that day, but gradually his hip began hurting him. Ed Washburn was outside supervising Claimant and Mr. Merida. Claimant stated that he made an appointment with Dr. Gallagher, who told Claimant that he had bursitis in his hip. Claimant did not mention the accident to Employer until sometime later when Claimant's hip began to bother him. (Tr. 48, 49).

When Claimant went to see Dr. Gallagher regarding his March 4, 2002 accident, Dr. Gallagher discovered, via x-ray, that Claimant's right hip had collapsed. Thus, Claimant had a total hip replacement. Dr. Gallagher told Claimant that trauma or avascular necrosis could have caused the hip to collapse. Claimant stated that Dr. Gallagher did not mention alcohol as a potential cause of his hip problem.[5] Claimant does not consider himself an alcoholic, nor has he ever been arrested for drinking. He explained that when he worked for Employer he would stop at a bar after work, maybe once a month.[6] As of the

[4] Claimant testified in his deposition that David Merida would have felt the bump when Claimant tripped and had seen Claimant trip. He also stated that Ed Washburn would have been in a position to see Claimant trip. (Tr. 64, 65).

[5] However, in Claimant's deposition, which is not an exhibit of record, he stated Dr. Gallagher told him alcohol can cause avascular necrosis if an individual is an alcoholic. (Claimant's Depo, pp. 54; Tr. 109).

[6] On cross-examination, Claimant admitted that he would usually have a few drinks when he got home at night. He also admitted that in 2003, Dr. Bande told Claimant to stop drinking. Employer's counsel presented Claimant with medical records from Dr. Bande which read, "Advised to quit smoking and stop alcohol, vodka use with lifestyle changes." (Tr. 110, 111; EX-19).

date of the hearing, Claimant had quit drinking. He does smoke about a pack of cigarettes a day. (Tr. 49, 50).

Claimant testified he was not paid worker's compensation until several weeks after the accident. Employer has not stopped paying worker's compensation, but has lowered the amount. Claimant began seeing Dr. Pribil after he saw a special on the news about the doctor. Dr. Pribil performed two fusions on Claimant's back at Lakeside Hospital on March 26, 2005. Claimant is still having problems from the surgery; he is having severe pain and is taking pain medications. Prior to the surgery, Claimant's quality of life began deteriorating. He could not do everyday activities such as cutting the grass or painting the house. He has not been fishing in over a year and a half. Claimant testified he may have tried to launch his boat himself since the accident, but doing so would cause him so much pain that he would rather pay to have a hoist do it. Claimant did receive a letter regarding different jobs that a vocational rehabilitation counselor had approved for him. (Tr. 52, 53, 54, 55).

On cross-examination, Claimant acknowledged that no one witnessed his March 4, 2002 accident. Claimant believes he told Dr. Gallagher, following the October 2001 tripping incident, that such incident had occurred. Following his January 1999 accident with his previous employer in which Claimant injured his knee and back, he had bruises on his back. However, within three months, Claimant stated he was much better and had very little trouble with his back from then on. Claimant acknowledged that throughout his treatment with Dr. Gallagher[7] he still complained of back pain, particularly when he would have to do some physically demanding activity at work.[8] Dr. Gallagher's records contained numerous occasions in which Claimant returned to Dr. Gallagher complaining of low back pain. (Tr. 62, 66, 67, 70; EX-2).

Claimant conceded if Dr. Gallagher's medical records disclose he was restricted to light duty, Dr. Gallagher must have placed that restriction on Claimant. However, Claimant repeatedly stated he explained the type of work activities he would be doing at Employer's to Dr. Gallagher and Dr. Gallagher

[7] Claimant saw Dr. Gallagher on an almost monthly basis from 1999 to 2002.

[8] Although Claimant stated his back would give him problems when he did particularly demanding work, and thus he would complain about this pain to Dr. Gallagher, he also told Dr. Gallagher the types of activities he was doing and Dr. Gallagher informed him that since it was not bothering Claimant, he could continue working.

stated that as long as it did not bother him, Claimant could do that type of work.[9] When Claimant was told that Dr. Gallagher had no record of this conversation and testified he never approved Claimant to do that type of work, Claimant stated Dr. Gallagher must not remember the conversation or he must be lying. (Tr. 72-75, 77).

Claimant has been a member of the Seafarer's Union since 1991. In order to get a job, each member had to pass the Union's annual physical. At each physical, Claimant had to fill out a medical history. Each year he described his past injuries, such as a broken leg from 10 years prior. However, on Claimant's 2001 physical, he did not report to the examining doctor that he had been given a permanent light duty restriction by Dr. Gallagher. In January 2002, Claimant again completed a physical examination. In this exam he did not disclose that Dr. Gallagher had prescribed him Soma and Vicodin. In the section entitled "injuries and/or operations," Claimant wrote knee surgery. However, the year prior, Claimant had written knee surgery/back injury. Claimant also conceded that after taking his 2002 physical exam, on the same day, he went to Dr. Hubbell's office and received treatment, in the form of a lumbar facet nerve median branch block, for back pain. Claimant did not disclose this to the doctor performing the physical.[10] (Tr. 78, 79, 86, 87, 88, 89).

On cross-examination, Employer's counsel again questioned Claimant about not having any back problems prior to the accident or on the day of the accident. Claimant explained that the injections he received from Dr. Hubbel took care of his back pain. However, Claimant acknowledged that he was never completely pain free. Employer's counsel presented Claimant with records from Dr. Hubbel dated February 21, 2002 (less than two weeks prior to his March 4, 2002 alleged accident) in which Claimant reported "pain that is worse with sitting in the lower back and radiation in the right leg." Claimant testified that after reviewing these records, he remembered that this was when he started having hip problems. Claimant stated it was not his

[9] Claimant told Dr. Gallagher that his position with Employer would require him to climb ladders, do painting and maintenance work on cranes, and heavy lifting.

[10] Dr. Wei performed Claimant's physical. In his deposition, Dr. Wei testified that Claimant would not have passed the physical examination if Dr. Wei had been aware Claimant had been placed on permanent light duty restrictions. (EX-25, p. 10). If Dr. Wei had only been aware of the narcotic pain medication and the injections, he would have referred to Claimant's treating physician/specialist to determine if he thought Claimant was capable of performing the work. (EX-25, p. 11).

back that was giving him these severe problems, but his hip. At first the doctors thought it was his back and treated his back, but then discovered it was his hip. (Tr. 90, 94, 95, 96; EX-19).

Claimant was further questioned on cross-examination regarding his October 25, 2001 accident. Claimant confirmed his deposition testimony in which he stated he told Dr. Gallagher about the accident during an October 31, 2001 office visit.[11] Claimant also acknowledged that at this same visit with Dr. Gallagher, he reported "having hip pain over the past month." (Tr. 100-103; EX-2).

On re-direct examination, Claimant explained that although he did not need the steroid injections in his back in order for him to keep working, he had the injections performed because he was hoping it would help him with some of the pain he was experiencing, especially nighttime stiffness. Claimant's pain was getting worse in his hip, yet the doctors thought the pain was from his back. When the injections did not work properly, the doctors discovered Claimant's problem was with his hip. According to Claimant, the doctors told him that his disc herniations had severely worsened after the March 4, 2002 accident. (Tr. 121).

Employer's counsel queried Claimant regarding the individuals Claimant was portraying as liars. Claimant testified David Merida's diary entries were lies and that Mr. Merida was lying when he testified he never threatened Claimant, Dr. Gallagher was lying if he stated he gave Claimant a light duty restriction and Al Ragas and Herman Bergeron were lying when they testified they never saw David Merida threaten Claimant. (Tr. 122-124).

David Merida

Mr. Merida testified at the hearing. He is a member of the Seafarer's International Union and has been working shoreside since April 4, 1988, as a crane maintenance electrician[12]. Mr.

[11] When presented with Dr. Gallagher's medical notes from Claimant's visits on October 31, 2001 and November 14, 2001, neither of which mentions a tripping accident, Claimant stated Dr. Gallagher either did not write it down or he did not write the truth down. Although Dr. Gallagher's notes do not mention Claimant's tripping accident until an office visit on February 22, 2002, Claimant asserted this was wrong and he had told Dr. Gallagher about the accident from the beginning. (Tr. 102, 103).

[12] Mr. Merida described this as a very physically demanding job. (Tr. 130).

Merida was Claimant's watch partner while they worked for Employer. Mr. Merida was laid off by Employer because the terminal was destroyed by Hurricane Katrina. He was subpoenaed as a witness for the hearing and did not come voluntarily, nor did he submit his journal voluntarily. His daily journal was a personal diary that Mr. Merida began keeping when a co-worker gave other co-workers a hard time at work. A Union official informed Mr. Merida that it might be a good idea to keep track of what was happening. The daily diary expanded from there and Mr. Merida began keeping track of everyday events. He made his journal notations daily. Mr. Merida did not discuss his testimony with Employer's counsel prior to trial. He told Employer's counsel he had no reason to discuss anything prior to the court appearance; he just wanted to come to court, state the truth and be done with the whole matter. (Tr. 130-133).

Mr. Merida confirmed numerous diary entries in which he wrote about Claimant describing the job as a good job on which to get hurt. On November 15, 2000, Mr. Merida wrote, "Scott's a dick. He says, 'Good job to hurt back.'" On that day, Mr. Merida and Claimant were doing a labor-intensive job involving acetylene bottles which weigh between 80-100 pounds. Another diary entry on December 6, 2000, states, ". . . Calling Ed, sleeping, not answering. Had to wait till 0-4, forty minutes after midnight for Scott to come and pin me. Says, 'perfect time to get hurt.'" According to Mr. Merida, Claimant was stating it would be a good time to get hurt because there was no supervision present. Mr. Merida described Claimant's statements as opportunistic statements regarding false allegations of an injury and not as statements discussing the safety hazards of the job. (Tr. 135-138; EX-13).

A diary entry from January 24, 2001, read, ". . . Scott complaining says his back hurts." Mr. Merida testified Claimant complained of back pain during the time they worked together. On April 11, 2001, Mr. Merida wrote, "Scott's a lazy f--k, sitting on his ass while I work. Says somebody's going to pay for his back. Jumped his ass. Told the lazy f—-k his back is his lazy ass fault. Don't f—-k up my job."[13] Mr. Merida explained that he was not proud of his words that day, but he was angry with Claimant because Claimant was not helping with the work. Mr. Merida had to climb the crane and Claimant sat below on a bucket. Claimant did not climb up because his back was hurting him. (Tr. 139, 140; EX-13)

[13] Mr. Merida asserted, on cross-examination, that he never physically threatened Claimant. Although his diary entry states "Jumped his ass," Mr. Merida explained this was a verbal assault, not physical. (Tr. 158).

According to Mr. Merida, who described the remarks as a plan, Claimant mentioned numerous times that someone was going to pay for his back. Claimant did not think he was going to get a pension from the Union because he still had to put in a good deal of time, so he was going to use lawsuits and disability compensation to pay for the various things he needed. (Tr. 141).

On July 31, 2001, Mr. Merida wrote, "Scott says his back hurts. Trying to go out." Claimant told Mr. Merida on numerous occasions he was trying to go out on disability compensation.[14] Mr. Merida did not believe Claimant had any intention of working. Nor did Mr. Merida believe Claimant's comments were in any way regarding safety concerns because he had "too many conversations with Scott about, you know the grand scheme of things to, to know different." Claimant and Mr. Merida had discussed where Scott wanted to end up in life on various occasions and it always involved a lawsuit or an insurance settlement. (Tr. 142-145; EX-13).

As recorded in Mr. Merida's diary, on February 1, 2002, Claimant left work at noon to go to a doctor's appointment regarding his back. On February 20, 2002, Mr. Merida wrote, "Scott walking around like an old man." Mr. Merida explained that some of the workers used to joke Claimant walked around like an old lady. On this date in particular, Claimant was walking around as if he was in a lot of pain. (Tr. 145, 146; EX-13).

On February 26, 2002, Mr. Merida wrote, "Scott just sitting his lazy ass on forklift. I'm doing all the work. Looking for a case!" Mr. Merida did not know if Claimant had mentioned, on this date, that he was "looking for a case," it was just Mr. Merida's impression at the time. Mr. Merida also acknowledged he was frustrated with Claimant because Claimant did not put in an equal share of work. (Tr. 147, 148; EX-13).

On March 4, 2002, the date of the accident, Mr. Merida wrote, "Scott claims he's hurt, bullshit as usual. Says he hurt his back while cleaning. Been limping for two weeks." Mr. Merida explained he was not working with Claimant at the time Claimant alleges to have been injured. However, Mr. Merida did confirm that he observed Claimant limping for about two weeks prior to the date of the accident. Mr. Merida recalled walking

[14] On August 14, 2001, Mr. Merida wrote, "Scott trying to go out on comp." Again on January 29, 2002, Claimant is quoted as saying, "Perfect time to get hurt." (EX-13).

in to work in front of Claimant on the day of the alleged accident. While Mr. Merida was filling out the sign-in sheet he heard the security guard make a reference to the way Claimant was walking; Mr. Merida turned around and saw Claimant limping. The security guard asked Claimant if he was alright or if he needed some assistance. (Tr. 148, 149; EX-13).

Regarding Claimant's alcohol use, Mr. Merida testified Claimant told him that Claimant was a "functional alcoholic." Claimant would always stop after work and get a Big Gulp and a pint on the way home. Mr. Merida observed Claimant hung-over at work numerous times. (Tr. 150).

Regarding Claimant's alleged October 2001 tripping accident, Mr. Merida explained he remembered that day well; however, he did not observe Claimant have any sort of accident nor feel any sort of jolt while carrying the steel with Claimant. (Tr. 151. 152).

On cross-examination, Mr. Merida stated he had not been concerned about losing his job because of Claimant; however, he was concerned about frivolous lawsuits affecting a potential new contract. Mr. Merida does not think all lawsuits are frivolous, nor did he have any bias or "problem" with Claimant prior to this "lawsuit." Mr. Merida complained to his supervisors Ed Washburn and Johnny Walston on numerous occasions about Claimant. Mr. Merida never observed Claimant being reprimanded. Mr. Merida wrote negative entries in his journal about people other than Claimant. Mr. Merida did not know Claimant had a hip problem. Mr. Merida qualified for worker's compensation for a previous injury that kept him out of work for about seven months. (Tr. 159, 160, 164).

Herman Bergeron

Mr. Bergeron testified by deposition on March 8, 2006. (EX-26). Mr. Bergeron worked as a crane maintenance electrician for Employer at the same time Claimant worked for Employer. Al Ragas was Mr. Bergeron's watch partner. Mr. Bergeron seldom worked with Claimant. Mr. Bergeron recalled that on March 4, 2002, he, Al Ragas, and Claimant were assigned to straighten up the storeroom. He began working in one corner, Mr. Ragas was in the middle and Claimant was on the opposite corner. Mr. Bergeron's view of Claimant was obstructed by an air conditioning unit dividing the room.

Mr. Bergeron became aware that Claimant was claiming to have injured himself through Mr. Ragas. Mr. Bergeron did not remember hearing a crash or any noise pertaining to an accident. Claimant left the room and went down the stairs to report the accident; Claimant was not limping or hunched over. (EX-26, pp. 6, 7, 8, 9, 10).

Mr. Bergeron had no knowledge of any accident in October 2001 involving Claimant. Mr. Bergeron had never witnessed David Merida scream or curse at Claimant. Mr. Bergeron respected both Ed Washburn and David Merida. (EX-26, pp. 11, 12, 13).

Alfred Ragas

Mr. Ragas testified by deposition on March 8, 2006. (EX-27). Mr. Ragas also worked for Employer as a crane maintenance operator at the time that Claimant was employed by Employer. He had no knowledge of Claimant hurting himself while carrying a piece of steel.

Mr. Ragas recalled the March 4, 2002 accident. Mr. Ragas was in the room with Claimant and heard Claimant say "ouch;" Claimant was also holding his back. Mr. Ragas did not hear any noise, such as a transformer falling, nor did Mr. Ragas see anything that could corroborate this accident beyond what Claimant told Mr. Ragas. Prior to this incident, Claimant had asked Mr. Ragas on numerous occasions about workers' compensation and how it worked. Mr. Ragas never witnessed David Merida yelling or cursing at Claimant. Mr. Ragas considered Claimant a lazy person and he did not think Claimant had actually hurt himself at the time of the alleged accident. (EX-27, pp. 6-11).

On cross-examination, Mr. Ragas explained he did not hold the fact that he considered Claimant to be lazy against Claimant; it was just an observation that Mr. Ragas had made. Mr. Ragas had no problems with David Merida; he liked him. He knew David Merida kept a journal that included notations about things which happened on the job. (EX-27, pp. 13, 14, 15, 16).

Ed Washburn

The deposition of Ed Washburn was taken post-hearing on March 14, 2006. (EX-29). Mr. Washburn worked as a port engineer for Employer and was a supervisor during Claimant's period of employment. At the time of the deposition, Mr. Washburn no longer worked for Employer.

Mr. Washburn did not consider Claimant's position as a crane maintenance electrician to be light duty work as there was lifting, bending, and climbing involved in the job. Mr. Washburn was not aware that Claimant had been placed on a permanent light-duty restriction prior to working for Employer. He explained Claimant would not have been hired had this been known because Employer needed this position filled by someone capable of full duty. Mr. Washburn did not consider Claimant to be a very good worker, Claimant missed a good deal of work and would often come to work shaky and sickly.[15] (EX-29, pp. 6-10).

Although Claimant identified Mr. Washburn as a potential witness to Claimant's October 2001 tripping accident, Mr. Washburn did not observe any such accident. Claimant reported this October 2001 accident to Mr. Washburn on February 25, 2002; Employer notified Claimant on Friday, March 1, 2002 that the alleged injury would not be recognized because Claimant did not file a report or notify anyone of the accident when it occurred. On March 4, 2002, Claimant reported his second alleged accident to Mr. Washburn. Mr. Washburn was suspicious and stated, "It seemed kind of obvious that it wasn't a real accident." Mr. Washburn had doubts about Claimant's allegations because on Friday, March 1, 2002, Mr. Washburn notified Claimant that his alleged October 2001 accident was not being recognized and then on the following Monday, March 4, 2002, Claimant had another unwitnessed accident. Mr. Washburn also believed Claimant probably had injuries prior to the accident. (EX-29, pp. 12, 13, 27).

Mr. Washburn was aware, from conversations with co-workers, that Claimant had made comments about faking an accident. However, Mr. Washburn considered the comments to be hearsay and could not take any action on those allegations. Mr. Washburn filled out the accident report and just made notations based on what Claimant was telling him. Mr. Washburn did not mention his suspicions on the accident report because there was no place on

[15] On cross-examination, Mr. Washburn explained he did not write Claimant up for poor performance because he was trying to help Claimant. In South Louisiana there are not a lot of crane electricians and Employer was more tolerant. Claimant could not be terminated for missing work because as long as he had a release, he was protected by the Seafarer's International Union. Claimant must have had a release for his absences or else he would have been terminated. Although Mr. Washburn had doubts about Claimant's physical ability to perform the job, there was nothing he could do because as long as Claimant produced a fit-for-duty evaluation, he had to be accepted for employment. (EX-29, pp. 18, 19, 21).

the accident report for his opinion. Upon investigation of the accident scene, Mr. Washburn found the transformer square on the shelf. Mr. Washburn called into a fraud hotline to report Claimant based on comments made by David Merida, Al Ragas and other co-workers in which Claimant told them he would get hurt and draw workers' compensation benefits. (EX-29, pp. 14-17).

Mr. Washburn heard Claimant complain about aches and pains continuously. However, he did concede that other employees complained also, just not as often as Claimant. Mr. Washburn observed Claimant climb the cranes, as this was part of the daily job; however, Claimant climbed slower than the other crane workers. David Merida complained to Mr. Washburn about Claimant's performance. Mr. Washburn told Mr. Merida that as long as Claimant had a fit-for-duty notice and was qualified as an electrician, there was nothing Employer could do about him being slow. Claimant never told Mr. Washburn that he was going to intentionally get hurt on the job. Mr. Washburn did not believe Claimant hurt himself on March 4, 2002. He explained that Claimant had sued ship companies in the past and based on Claimant's personality, Mr. Washburn believed Claimant was faking an accident. Mr. Washburn did not think all lawsuits were frivolous and did not have an opinion regarding Claimant's previous lawsuit against another company. (EX-29, pp. 22-25).

Mr. Washburn stated Claimant told him he was going to have hip replacement surgery prior to the March 4, 2002 accident. Claimant had been complaining about his hip for a couple of months prior to the accident, but it seemed to have gotten worse immediately prior to the accident. (EX-29, pp. 27, 35).

Based on Mr. Washburn's investigation of the accident, he concluded that the transformer was not moved. He asked Mr. Bergeron and Mr. Ragas if either of them had moved the transformer and neither had. Mr. Bergeron found the transformer on the shelf and not on the floor. He explained the accident report did not mention his conclusion that the transformer had not been moved because the accident report did not include the details about his investigation. Employer did not have a formal investigation report document; therefore, Mr. Bergeron's finding that the transformer had not been moved was not documented anywhere he was aware of. (EX-29, pp. 36-38).

The Medical Evidence

Dr. Daniel J. Gallagher

Dr. Gallagher testified by deposition on July 8, 2005. (EX-22). Dr. Gallagher's medical records from his treatment of Claimant were also introduced into evidence as EX-2 and will be incorporated into this evidentiary summary when relevant.

Dr. Gallagher first began seeing Claimant as a patient on February 5, 1999 due to a work-related injury in which Claimant injured his knee and back. Claimant was diagnosed with a torn meniscus in his right knee and some degenerative disc disease in his lumbar spine consistent with someone who is a heavy laborer in their mid-30s. Throughout Dr. Gallagher's treatment of Claimant, Claimant continuously complained of low-back pain, although Claimant's pain would wax and wane. On a November 9, 1999 report, Dr. Gallagher notes finding Waddell's signs with regard to Claimant's back. Waddells' signs are signs of symptom exaggeration and malingering; in other words, Claimant's complaints seemed to exceed what Dr. Gallagher would expect them to be based on his objective findings. (EX-22, pp. 5-8).

Dr. Gallagher treated Claimant's back pain with medication for about the first two years of treatment. In 1999, Claimant underwent a functional capacity evaluation (FCE) in which he received a light duty recommendation. On February 29, 2000, Dr. Gallagher placed Claimant on permanent light duty restriction; however, Claimant would continue to work from time to time and sometimes this would worsen Claimant's symptoms. Dr. Gallagher placed Claimant on permanent light duty because he was concerned that strenuous activities could aggravate Claimant's degenerative disc disease or cause herniations of the already weakened discs. If Claimant continued to work heavy duty it would not surprise Dr. Gallagher if Claimant developed disc herniations in his back – even normal activity could cause such problems. Dr. Gallagher was confident that he informed Claimant of this light duty restriction. Dr. Gallagher was questioned regarding assertions in Claimant's deposition that he had told Dr. Gallagher about the specific activities involved in his employment with Employer and Dr. Gallagher had approved the job. Dr. Gallagher testified if Claimant had told him that he would be doing heavy duty work, including lifting 300 pounds, Dr. Gallagher would have advised him not to do that work. (EX-22, pp. 8-15).

Dr. Gallagher examined Claimant on October 31, 2001, and diagnosed Claimant with bursitis in the right hip. Dr. Gallagher had no notes of Claimant reporting a "tripping accident at work" at this office visit.[16] Claimant next saw Dr. Gallagher on November 14, 2001, and again did not report a work-related accident. Dr. Gallagher stated that his nurse or he always writes down if a patient reports an accident. At this November visit, Claimant reported continuous low back pain and worsening right hip problems. On February 22, 2002, Dr. Gallagher noted that Claimant reported worsening right hip pain four months after lifting at work; this is the first mention of the alleged October 2001 accident that Dr. Gallagher has in his records. At this office visit, Dr. Gallagher diagnosed Claimant with avascular necrosis in the right hip and explained that this can be caused by cortisone, alcohol, and trauma. (EX-22, pp. 18-22).

Dr. Gallagher explained that the only way to relate Claimant's hip problems to a certain incident or trauma is by relying on what Claimant reports. However, according to Dr. Gallagher, most cases of avascular necrosis are not traumatic, but rather, are due to sickle cell, alcohol or are idiopathic and eventually the hip collapses and needs to be replaced. There was nothing Dr. Gallagher saw over the course of his treatment of Claimant that led him to believe Claimant's hip collapse was caused by some traumatic event. Basically, Dr. Gallagher could not conclude one way or another why Claimant's hip collapsed when it did. (EX-22, pp. 22, 25, 26).

Dr. Gallagher last examined Claimant on March 18, 2005. Dr. Gallagher noted bilateral hip avascular necrosis and degenerative disc and failed back syndrome due to failed surgery in the past, related to his chronic low back pain. (EX-22, p. 30).

The following is a summary of the relevant excerpts of Dr. Gallagher's medical records and findings pertaining to Claimant (EX-2):

February 5, 1999 – Claimant saw Dr. Gallagher regarding his work-related accident with a former employer. Claimant had injuries to his back and knee.

[16] Dr. Gallagher's notes from Claimant's October 31, 2001 office visit state Claimant had been having right hip pain over the past month. (EX-22, pp. 20).

March 1, 1999 – Claimant saw Dr. Gallagher for a follow-up visit after having a knee arthroscopy. Claimant continued to complain of low back pain. Dr. Gallagher noted that Claimant was healing slower than expected and sent him to physical therapy.

March 25, 1999 – An MRI of Claimant's lumbar spine was performed. The MRI findings indicated Claimant had a posterior central and left paracentric disc extrusion impinging directly on the left exiting nerve root. All of the lumbar discs were moderately desiccated and narrowed.

September 24, 1999 – Claimant returned to Dr. Gallagher's office after two months at sea. Claimant reported his knee and back hurt him on occasion. Dr. Gallagher noted Claimant had gained weight and prescribed that he join a gym. Dr. Gallagher also noted Claimant had degenerative disc disease of the lumbar spine. Dr. Gallagher explained that Claimant's work could aggravate his condition.

November 9, 1999 – Claimant returned to Dr. Gallagher complaining of worsening back and knee pain. Dr. Gallagher found Claimant very stiff and also noted positive Waddell's signs of symptom exaggeration. Claimant was overweight and out of shape. Dr. Gallagher believed Claimant had continuing back pain due to his degenerative disc disease, but did not know why Claimant's knee was still bothering him.

December 1, 1999 – Claimant went to Dr. Gallagher's office complaining of pain, depression and monetary problems.

December 14, 1999 – Claimant appeared in much better spirits. He was attending a work conditioning program, but, although he had good effort and good attendance, Claimant showed minimal improvement. Claimant claimed that he was feeling much better after this work conditioning program and wanted to return to work onshore where there would be no large waves or rough weather. Dr. Gallagher thought that was acceptable.

January 20, 2000 – Dr. Gallagher wrote a letter to Claimant's prior employer's attorney, in which Dr. Gallagher opined that Claimant was permanently disabled and although he could perform light to medium duty work, he was unable to return to working on ships at sea in rough weather.

February 29, 2000 – Claimant reported to Dr. Gallagher that he was feeling better until he fell down some stairs at work and

injured his knee and back. Dr. Gallagher placed Claimant on permanent light duty and gave Claimant an IM Depo-Medrol shot.

March 12, 2001 – Claimant complained to Dr. Gallagher of back pain and elbow pain. Claimant requested a Depo-Medrol injection, since such injections previously helped Claimant.

August 31, 2001 – Claimant received a cortisone injection.

October 31, 2001 – Claimant returned to Dr. Gallagher complaining of back pain into his right buttock and down his leg. Claimant told Dr. Gallagher he had been having right hip pain for the past month. Dr. Gallagher diagnosed Claimant with bursitis in the hip.

November 14, 2001 – Claimant continued to have low back pain, right hip pain and testicular and scrotal pain for the past several months.

November 16, 2001 – An MRI of Claimant's lumbar spine revealed stable, chronic L5-S1 disc lesion and stable bulging degenerative discs from L1-2 and L4-5. The radiologist noted that this showed no adverse changes from the MRI dated March 25, 1999.

January 2, 2002 – Claimant returned to Dr. Gallagher still complaining of low back pain and right hip pain.

February 22, 2002 – Dr. Gallagher's notes state that Claimant reported worsening hip pain after a lift at work.

March 4, 2002 – Claimant went to Dr. Gallagher's office after reporting his alleged accident at work. Claimant stated he injured his right and left hip and his back at work while lifting a 50-pound object. Claimant had received a cortisone injection two weeks prior and said his hip had been feeling good until this accident. Dr. Gallagher found early avascular necrosis in the right hip and a normal left hip.

March 5, 2002 – Claimant returned to Dr. Gallagher complaining of extreme pain in his hips and back as well as testicular and penile numbness. Dr. Gallagher found Claimant's exam unchanged from the previous day.

March 6, 2002 – An MRI of Claimant's hips revealed bilateral avascular necrosis and some minimal collapse of the right femoral head.

March 7, 2002 – Another MRI of Claimant's lumbar spine was performed. This MRI revealed multi-level degenerative disc desiccation at L2, L3, and L4 and disc extrusion at L5-S1 with direct neural impingement.

March 19, 2002 – Based on the recent MRI, Dr. Gallagher opined that it showed worsening from the previous MRI with further disc herniation of the L5-S1 disc with nerve impingement. Dr. Gallagher noted that although Claimant's accidents of October 2001 and March 2002 could have aggravated both Claimant's back and hip problems, causation in this case would be hard to determine. Claimant asserted that his back and hip pain were related to two accidents at work and Dr. Gallagher agreed that Claimant's work conditions could have aggravated his condition.

April 2, 2002 – In a letter to Employer, Dr. Gallagher opined that although Claimant's hip and back condition could be related to the traumas that Claimant is alleging, there was no way to know with 100% accuracy what caused Claimant's conditions to worsen. While Claimant's recent MRI showed worsening of his disc condition, this could be the result of trauma or simply the progression of Claimant's degenerative disc disease.

Dr. Stefan G. Pribil

Dr. Pribil, a neurosurgeon who performed two back fusion surgeries on Claimant, testified by deposition on July 7, 2005. (CX-12; EX-23). Dr. Pribil first examined Claimant on August 13, 2002. Claimant filled out a patient history questionnaire in which he noted his accident of March 4, 2002, and stated he injured himself lifting a heavy steel beam. (CX-12, pp. 5, 9).

According to Dr. Pribil, aseptic necrosis is caused by a steroid-induced inflammatory change in individuals who receive more steroids than their body can tolerate. Alcohol can contribute to this condition. Claimant had numerous lumbar problems, and according to Dr. Pribil, the Schmorl's nodes and eroded endplates of Claimant's spine were less likely to have been caused by a work-related injury than the disc protrusions that Claimant had. Dr. Pribil did not note anything on the 2002 MRI that was evidence of a traumatic injury. (CX-12, pp. 10, 11).

Dr. Pribil believed Claimant had an event that stood out in his mind as contributing to his pain. Dr. Pribil, thus, believed this incident materially contributed to Claimant's

symptoms that eventually led Claimant to seek Dr. Pribil's care and subsequent surgery. Claimant's treatment was paid for by the Seafarer's health plan and not workers' compensation. Dr. Pribil explained that the history a patient gives determines 90% of the patient's care and treatment. (CX-12, pp. 46, 54).

Dr. Alois Joseph Binder

Dr. Binder testified by deposition on July 5, 2005. (EX-24). Dr. Binder was hired by Gallagher Bassett, the third party administrator for Employer, to do an independent evaluation of Claimant. Dr. Binder only evaluated Claimant's hip problem. According to Dr. Binder, there is generally some type of trauma that leads to the collapse of a hip with avascular necrosis. Based on Claimant's assertions that he experienced a work-related accident, Dr. Binder attributed 25% of Claimant's injury to his work accident and 75% to his pre-existing condition.

When someone presents to Dr. Binder with bilateral avascular necrosis, it is more likely that the avascular necrosis was not caused by trauma but rather by some metabolic problem or some other cause. The MRIs taken on February 22, 2002 and April 2, 2002, did not show any change in Claimant's hip, thus, Dr. Binder opined that any intervening accident in March 2002 would not have led to any anatomical changes of the femoral head (collapse of the hip) because the femoral head had already collapsed prior to March 2002. Dr. Binder would not have been surprised if Claimant had presented with the same symptoms and conditions without any traumatic event as an explanation. (EX-24, pp. 6, 13, 14, 17, 22, 26).

Medical Records of Dr. Patrick Hubbell (EX-18)

December 21, 2001 - Dr. Hubbell performed a Caudal Epidural Steroid Injection on Claimant to treat a diagnosis of Lumbar Spondylosis, Stenosis and Myelopathy.

January 18, 2002 – Dr. Hubbell performed a Lumbar Facet Nerve Median Branch Block at the right L2-3, L3-4, L4-5, and L5-S1 to treat Claimant's complaints of pain in his hip and back.

January 31, 2002 - Claimant reported that immediately following the Lumbar Facet Nerve Median Branch Block he felt about 98% better; however, his pain gradually returned and as of the date of this appointment Claimant was about 25 to 33% pain free.

February 1, 2002 – Dr. Hubbell performed Radiofrequency Ablation of the Lumbar Facet Nerves L2 to S1.

February 21, 2002 – Claimant returned post-op still complaining of pain in his lower back that is worse with sitting and radiation into his right leg, groin and testicles, as well as hip pain. Dr. Hubbell noted that he wanted to take lateral films of Claimant's hips and have Claimant undergo a diskogram at L3-4, L4-5, and L5-S1 due to Claimant's pain in his back and radicular leg pain.

Other Evidence:

Claimant's statement of April 30, 2002

On April 30, 2002, Deborah Robichaux, on behalf of Employer/Carrier, took the statement of Claimant and asked Claimant to describe what happened on March 4, 2002. (EX-8). Claimant explained he was upstairs in the machine shop cleaning and wiping down shelves and he bent over to pick up a transformer that weighed about 50-60 pounds. He was going to move the transformer and put it on the shelf that was about three feet away. Claimant picked up the transformer and took a step forward when he felt something in his hip pop and a sharp pain in his right leg. Al Ragas was standing about five feet away, although Claimant did not know if Mr. Ragas had witnessed the accident. Claimant stated Mr. Ragas heard him when he dropped the transformer and that Claimant made a noise because he was hurt. (EX-8, p. 2)

Claimant stated Mr. Ragas came over to see if Claimant was okay. Claimant told Mr. Ragas he had hurt his back. Ten minutes later Claimant again told Mr. Ragas that his back and hip were bothering him, and Mr. Ragas recommended Claimant report it to their supervisor, Mr. Washburn. At that point, Claimant told Mr. Washburn what had happened. Id.

The Contentions of the Parties

Claimant alleges that he was injured on March 4, 2002, while in the employ of Employer and thus should receive compensation and medical benefits. Employer, on the other hand, asserts there was no accident or injury on March 4, 2002, that

Claimant is not credible and no compensation or medical is owed.[17]

I agree with Employer, and for the reasons discussed below, find that Claimant has failed to meet his burden of persuasion, by a preponderance of the evidence, that he suffered a compensable injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g.* 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

A. Claimant's Credibility

Employer/Carrier contend Claimant is not credible and consistently lied in order to gain workers' compensation benefits. Employer/Carrier argue that Claimant's assertion of an injury and accident on March 4, 2002, has been contradicted by the testimony of his co-workers and no substantial, credible

[17] Although Employer/Carrier address two separate accidents, one alleged to have occurred on October 25, 2001, and the second on March 4, 2002, Claimant has not made a claim or an allegation regarding the October 2001 injury. There is nothing in the record, nor in Claimant's brief, to indicate that Claimant is requesting compensation for this October 2001 accident.

evidence has been submitted to establish Claimant's **prima facie** case of an accident and resulting injury.

An administrative law judge has the discretion to determine the credibility of witnesses. An administrative law judge can properly discredit the testimony of a Claimant and find that the evidence fails to establish the existence of an injury. Mackey v. Marine Terminals Corpp., 21 BRBS 129 (1988). An administrative law judge may also accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

In this instance, I find that Claimant is not credible and has failed to provide substantial evidence that an accident occurred at work, thus failing to establish causation. There are a myriad of factors diminishing the credibility of Claimant's testimony. I find that because of the many inconsistencies and contradictions in his testimony and in the documentary evidence Claimant's hearing testimony was generally equivocal, ambiguous, incredible and unpersuasive when correlated internally with statements made in his deposition. Furthermore, Claimant's behavior, bearing, manner and appearance while testifying before me, in short his demeanor, was not persuasive.

Employer/Carrier assert that Claimant made repeated comments to co-workers, especially to his watch partner, David Merida, insinuating that he planned to "fake" an accident in order to receive workers' compensations benefits. These comments were recorded in a daily journal about which Mr. Merida testified. Although Claimant attempted to portray these statements as comments made regarding unsafe working conditions, this is not supported by the evidence. Claimant never reported unsafe working conditions to his supervisor or union officials. Mr. Merida testified that Claimant had discussed with Mr. Merida on numerous occasions his "plan" to have workers' compensation or some type of lawsuit pay for the things that Claimant needed. Mr. Merida testified that these statements were opportunistic statements made by Claimant regarding workers' compensation. All of Mr. Merida's co-workers who testified respect him and thus Claimant has provided no reason for me to doubt the veracity of Mr. Merida's testimony.

Even Claimant's attempts to refute Mr. Merida's diary entries by portraying a volatile relationship between himself and Mr. Merida, instead, point out the inconsistencies in Claimant's testimony. Claimant stated that he and Mr. Merida did not get along and Mr. Merida physically threatened Claimant in front of Al Ragas and Herman Bergeron. However, both alleged witnesses testified they had never witnessed Mr. Merida physically threaten Claimant.

Employer/Carrier further aver that Claimant's credibility is challenged by his inconsistent reports of a previous October 2001 accident. Claimant contends that in October 2001 he was carrying a piece of heavy steel with David Merida and tripped and injured his hip. Despite Claimant's contentions that Mr. Merida would have felt a jolt or bump when Claimant tripped, Mr. Merida claims he did not feel anything or witness anything indicative of an accident. Claimant asserted that he told Dr. Gallagher about this "tripping" incident at his next office visit on October 31, 2001. Dr. Gallagher has no records of such report by Claimant until February 22, 2002 – only three days prior to Claimant reporting the alleged accident to Mr. Washburn. Although Claimant alleges to have informed his doctor about the accident and the resulting hip pain, he failed to report this to Employer until about four months after the date of the alleged incident.

Claimant's credibility is further diminished by his consistent claims at hearing that he was not having back problems prior to the accident or any back pain on the day of the accident.

Claimant was questioned by his attorney on direct examination:

"Q: Now, were you having back pains before you tried to do this [move the transformer]?
A: No.
Q: How about on the day of this accident, were you having any sort of back pain?
A: No.
Q: How about before that?
A: No."

(Tr. 47).

Claimant's staunch position that his back was not bothering him prior to the accident is directly contradicted by Dr.

Gallagher's testimony and medical records, the medical records of Dr. Hubbell and the testimony and diary entries of David Merida. Dr. Gallagher testified that Claimant consistently complained of back pain that would wax and wane depending on Claimant's activities. Dr. Gallagher's medical records show that Claimant complained of back pain on nearly every visit. Claimant was also receiving injections for both his back and hip pain. Dr. Hubbell performed at least three injections/procedures on Claimant from December 2001 until February 2002. Shortly before Claimant's accident, on February 21, 2002, Claimant returned to Dr. Hubbell still complaining of back pain and hip pain. David Merida testified that Claimant often complained about back pain. Mr. Merida also had numerous diary entries recording Claimant's complaints of pain or inability to work because his back was bothering him. Specifically, Mr. Merida testified that on the day of the alleged accident Claimant was limping and walking with difficulty. Mr. Merida also recorded in his diary on that day Claimant had been limping for two weeks. I find Claimant's assertion that he was not suffering from back pain prior to the accident is not credible.

In January 2002, Claimant again showed signs of untrustworthiness when he withheld information from the doctor performing his annual physical. Claimant failed to disclose that he had a previous back injury. More importantly, Claimant did not disclose that he was leaving work that same day to have a lumbar facet nerve median branch block performed on his lumbar region by Dr. Hubbell.

Employer/Carrier assert, and I agree, that Claimant's opportunistic comments about abusing workers' compensation, his inconsistent and unsupported statements regarding a prior accident in October 2001, and his contradictory position that he was not having back pain prior to the March 2002 accident support a conclusion that Claimant is not credible and thus his allegations of a March 4, 2002 accident are unreliable and not supported by his incredible testimony.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corpp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corpp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

On the other hand, uncorroborated testimony by a **discredited** witness is insufficient to establish the second element of a **prima facie** case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corpp., 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-15 (1976); Smith v. Cooper Stevedoring Co., 17 BRBS 721, 727 (1985) (ALJ). It is claimant's burden to establish each element of his **prima facie** case by affirmative proof. Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989).

In the present matter, although it is not disputed that Claimant suffers from various medical ailments, Claimant has

failed to establish that he suffered an injury on March 4, 2002, in the course and scope of employment, or conditions existed at work which could have caused the harm. As discussed, I have not found Claimant to be credible. Therefore, evidence besides his uncorroborated testimony regarding the March 4, 2002 accident is necessary to establish Claimant's **prima facie** case. Claimant has failed to provide sufficient evidence to establish his burden.

Claimant alleges an unwitnessed accident occurred on March 4, 2002, when he and two co-workers, Al Ragas and Herman Bergeron, were cleaning a storage area for Employer. Claimant attempted to move a transformer that was on the ground, stuck up underneath a shelf, in order to clean behind it.[18] Claimant lifted up the transformer about six inches off the ground and felt a sharp pain which resulted in Claimant dropping the transformer. Claimant asserts that although neither Mr. Ragas nor Mr. Bergeron were watching Claimant, they were close enough (Claimant approximated they were about seven feet from him) that Claimant believes they would have heard a loud noise from the transformer when it hit the ground. However, both men testified that they did not hear any such noise.

At the hearing, Claimant stated that it was noisy in the storage area; however, immediately following the alleged accident, Mr. Ragas did hear Claimant say "ouch" and witnessed Claimant holding his back. If Mr. Ragas were able to hear Claimant speak the word "ouch", it is reasonable to assume that Mr. Ragas should have also heard the transformer hit the ground, just moments before, when Claimant allegedly dropped it. Mr. Ragas testified that he did not believe Claimant had actually injured himself on March 4, 2002.

Mr. Washburn also testified that no accident occurred. Although Claimant identified Mr. Washburn as a potential witness to Claimant's alleged October 2001 accident, Mr. Washburn testified he did not witness any such accident. Claimant also noted that David Merida was carrying the other end of the sheet of metal and would have felt a bump or jolt when Claimant tripped. Mr. Merida did not feel any bump or anything else to indicate Claimant had had any type of accident. On February 25,

[18] Initially, subtle inconsistencies in Claimant's account of the accident are noted. Although at the hearing Claimant stated he was moving a transformer that was on the ground, stuck up underneath a shelf, so that he could clean behind it, in a statement given a few months following his accident, EX-8, Claimant stated he was moving the transformer to put it back on the shelf about three feet away.

2002, Claimant reported this alleged October 2001 accident to Mr. Washburn for the first time. The following Friday, March 1, 2002, Mr. Washburn informed Claimant that Employer was not recognizing his claim because it was not timely reported. The next Monday, March 4, 2002, Claimant allegedly suffered the instant accident and reported it to Mr. Washburn. Mr. Washburn did not believe Claimant had suffered an injury or been involved in an accident. The fact that Claimant was told on Friday that his October 2001 claim was being denied and then on Monday has another accident, seemed suspicious to Mr. Washburn. Mr. Washburn was also aware, through statements made by Claimant's co-workers, that Claimant had made comments about faking an accident.

Mr. Washburn also conducted an accident investigation and concluded that the transformer had not been moved. Although Claimant reported that he was moving the transformer from the floor to the shelf when he was hurt, Mr. Washburn found the transformer sitting squarely on the shelf. Mr. Washburn questioned Al Ragas and Herman Bergeron, neither of whom reported they moved the transformer.

Notwithstanding the foregoing internal inconsistencies and contradictory statements, I further find that the external medical evidence of record does not buttress the fact that Claimant suffered a work-related injury or aggravation of a pre-existing condition on March 4, 2002, as a result of his alleged work accident.

From an objective standpoint, Dr. Gallagher's medical records reveal that Claimant reported having hip pain for **several** months when he visited Dr. Gallagher on November 15, 2001, three weeks after the alleged October 25, 2001 work incident. Dr. Gallagher would only attribute Claimant's hip problem to an October 2001 work accident if his history was correct or credited. Claimant, by his own report, was not asymptomatic before the alleged October 2001 incident. Furthermore, Claimant's diagnosis of avascular necrosis of the right hip, which existed before the October 2001 incident, whether caused by unrelated activities such as excessive alcohol use, was most likely not related to an alleged work trauma according to Drs. Gallagher and Binder.

Incredibly, Claimant would not acknowledge ongoing medical treatment for his low back pain before his alleged March 4, 2002 accident, which is abundantly clear from the medical evidence of record. Such treatment included the care of a pain management

specialist for epidural steroid injections, pain medication and lumbar radiofrequency ablation of his facet nerves, and as late as one month before his alleged March 4, 2002 work accident, an examination where Claimant reported radiculopathy into his legs. He also continued to complain of low back pain two weeks before his alleged work accident. The diagnostic MRI after the alleged March 2002 accident showed no worsening of his prior existing low back condition and when compared by Dr. Gallagher to earlier MRIs, was characterized as "basically the same thing."

In light of the medical evidence of record, I find the medical reports of Drs. Gallagher and Hubbell persuasive in establishing that Claimant suffered from hip pain before his alleged accident of October 25, 2001 and was actively treated for low back pain for years before his alleged March 4, 2002 accident. Moreover, there is no credible objective evidence that his back condition worsened or was aggravated by the alleged March 2002 incident.

Although an unwitnessed accident **credibly** described can serve as a basis for asserting the Section 20(a) presumption, the evident discrepancies and inconsistencies in Claimant's overall testimony and demeanor do not support such a finding. Thus, I find Claimant has failed to establish a **prima facie** case by failing to prove by a preponderance of the evidence that he suffered a harm or pain on October 25, 2001 or March 4, 2002, or that working conditions on these dates could have caused his alleged injuries. By failing to establish causation, Claimant is not entitled to the invocation of the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988). See Greenwich Collieries, supra.

In view of the foregoing findings and conclusions, the remaining unresolved issues of nature and extent, rate of compensation, Section 7 medical care and treatment, including the surgery performed by Dr. Pribil, and Employer/Carrier's entitlement to Section 8(f) relief, are rendered moot.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

Claimant's claim for compensation and medical benefits under the Act is hereby **DENIED.**

ORDERED this 26th day of July, 2006, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge